U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 November 2005

Case No.: 2004-BLA-6131

In the Matter of:

LEONARD ADAMS
Claimant

v.

WHITAKER COAL CORP.
Employer

SUM COAL COMPANY
Carrier

and

DIRECTOR,OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES

Edmond Collett, Esquire
For the Claimant

Lois A. Kitts, Esquire
For the Employer/Carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the "Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

Mr. Leonard Adams, represented by counsel, appeared and testified at the formal hearing held August 30, 2005 in Hazard, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. Thereafter, I closed the record. I based the following Findings of Fact and Conclusions of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, EX and CX refer to the exhibits of the Director, Employer and Claimant, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Claimant filed an application for Federal Black Lung benefits on February 9, 1998. (DX 1, p. 197). After reviewing the relevant evidence, the Director denied the claim on June 10, 1998. (DX 1, p. 113). Following an appeal by Claimant, an informal conference was held on August 27, 1998. Benefits were denied on October 7, 1998, in a Proposed Decision and Order Memorandum of Conference. (DX 1, p. 91). Claimant requested a formal hearing and the claim was transferred to the office of Administrative Law Judges. (DX 1, p. 87). After a formal hearing and reviewing the evidence in the record Judge Roketenetz issued an opinion denying benefits on November 24, 1999. (DX 1, p. 50). Judge Roketenetz's decision was then affirmed by the Benefits Review Board on December 18, 2000. (DX 1, p. 3).

Claimant filed the instant subsequent claim for benefits on January 16, 2003. (DX 3). The District Director denied Claimant's subsequent claim on December 15, 2003. (DX 29). Claimant then filed a notice contesting the Director's finding and requesting a formal hearing. (DX 31). On April 19, 2004 the claim was transferred to the Office of Administrative Law Judges. (DX 35).

Factual Background

Claimant, Leonard Adams was born on August 13, 1935 and has a ninth grade education. (DX 3, Tr. 11-12). He remarried Judy Ann Pennington on September 4, 1999. (DX 9). Claimant worked the majority of his career in the coal mines from 1978 until 1996. (DX 29). He first worked as an underground feeder operator and then as a sweeper on the surface of the mine. (Tr. 13-14).

Claimant testified he suffers from shortness of breath, trouble sleeping and a smothering feeling while trying to sleep. (Tr. 16-18). Claimant stated he smoked one or two cigarettes a day

for twenty years and he also used smokeless tobacco. (Tr. 12). He quit using tobacco products twenty years ago. (Tr. 12). Therefore, I find Claimant smoked two packs of cigarettes a week for twenty years.

Current Contested Issues

The parties contest the following issues regarding this claim:

1. Whether Claimant's claim was timely filed;

2. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

3. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

4. Whether Claimant is totally disabled;

5. Whether Claimant's total disability, if present, is due to pneumoconiosis;

6. Whether the evidence establishes a material change in conditions per 20 C.F.R. 725.309(c),(d).

The employer also contests other issues that are identified at line 18(b) on the list of issues. (DX 35). These issues are beyond the authority of an administrative law judge and are preserved for appeal.[1]

Dependency

Claimant alleges one dependent for the purposes of benefit augmentation, namely his wife, Judy. (DX 3). They remarried on September 4, 1999. (DX 9). Claimant submitted the marriage certificate establishing the relationship with his wife and testified as to her dependency. (DX 9, Tr. 11). Accordingly, I find that Claimant has one dependent for the purposes of benefit augmentation.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant's length of coal mine employment is a non-contested issue. The District Director made a finding of sixteen years in coal mine employment. (DX 29). Claimant testified to working in coal mine employment between 1976 and 1994. (Tr. 13-15). The documentary evidence includes Claimant's Social Security earnings report and an employment questionnaire. (DX 4-7). Accordingly, based upon all the evidence in the record, I find that Claimant was a coal miner, as that term is defined by the Act and Regulations, for sixteen years. He last worked in the Nation's coal mines in 1996. (DX 3).

[1] These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act, therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

Timeliness of Claim

Under Section 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. The Employer must rebut this presumption. Because the Employer has failed to provide evidence that Claimant received the requisite notice more than three years prior to filing his claim for benefits, I find that this claim was timely filed.[2]

Threshold Issue for Subsequent Claims

Under the amended regulations of the Act, the progressive and irreversible nature of pneumoconiosis is acknowledged. 20 C.F.R. § 718.201(c). Consequently, claimants are permitted to offer recent evidence of pneumoconiosis after receiving a denial of benefits. *Id.* The new regulations provide that where a claimant files a subsequent claim more than one year after a prior claim has been finally denied, the subsequent claim must be denied on the grounds of the prior denial unless "Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d). If a claimant establishes the existence of an element previously adjudicated against him, only then must the administrative law judge consider whether all the evidence of record, including evidence submitted with the prior claim, supports a finding of entitlement to benefits. *Id.* A duplicate claim will be denied unless Claimant shows that one of the applicable conditions has changed since the date of the previous denial order. *Id; see, also Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998 (6th Cir. 1994).

Accordingly, because Claimant's previous claim was denied, he now bears the burden of proof to show that one of the applicable conditions of entitlement has changed. 20 C.F.R. § 725.309(d). I must review the evidence developed and submitted subsequent to December 18, 2000, the date of the prior denial, to determine if he meets this burden. *Id.*

The following elements were deemed not shown by Claimant as a result of the initial denial: That he had pneumoconiosis as defined by the Act and the regulations; his pneumoconiosis arose out of coal mine employment; and he is totally disabled due to pneumoconiosis. 20 C.F.R. § 410.410(b).

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood

[2] Employer has failed to point to specific evidence establishing total disability was communicated to Claimant. Furthermore, the only medical opinion report in the previous record finding total disability is that of Glen Baker, M.D. Judge Roketenetz found this opinion unreasoned on the issue of total disability. (DX 1, p. 50).

gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414 (a)(3)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii). Furthermore, since this is a subsequent claim only evidence submitted after December 18, 2000 will be considered unless a material change in physical condition is proven. 20 C.F.R. § 725.309(d).

A. X-ray Reports[3]

Exhibit	**Date of X-ray**	**Physician/Qualifications**	**Interpretation**
DX 11	5/2/03	Simpao	1/0
DX 12	5/2/03	Barrett B-reader	Quality reading
DX 16	5/2/03	Hayes BCR/B-reader	0/0
DX 15 & EX 1	9/10/03	Dahhan B-reader	0/0
EX 4	6/17/04	Rosenberg B-reader	0/0

B. Pulmonary Function Studies[4]

Exhibit/ Date	**Physician**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Tracings**	**Comments**
DX 11 5/2/03	Simpao	67/ 70"	3.21	4.49	57	72	Yes	Good[5]

[3] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a) and (b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[4] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Benefits Review Board (the "Board") has held that a ventilatory study which is accompanied by only two tracings is in substantial compliance with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp*., 12 B.L.R. 1-27 (1988). The values from the FEV_1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[5] Employer provided a rebuttal opinion by Matthew A. Vuskovich, M.D., finding the May 2, 2003 pulmonary function tests valid. Dr. Vuskovich interpreted the spirometry as normal. (EX 5).

EX 1 9/10/03	Dahhan	68/ 68.6"	2.87	3.72	N/A	77	Yes	Poor Effort
EX 4 6/17/04	Rosenberg	68/ 68"	2.47	3.47	N/A	71	Yes	Good Effort Pre-bronchodilator
EX 4 6/17/04	Rosenberg	68/ 68"	2.75	3.53	N/A	78	Yes	Good Effort Post bronchodilator

C. Blood Gas Studies[6]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 11	5/2/03	Simpao	41.1	84.1	Resting	None[7]
EX1	9/10/03	Dahhan	35.9	85	Resting	Normal value[8]
EX 1	9/10/03	Dahhan	34.6	99.2	Exercise	Normal value
EX 2	6/17/04	Rosenberg	37.9	91.2	Resting	Normal value[9]

D. Narrative Medical Evidence

Valentino Simpao, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on May 2, 2003, at which time he took a patient history of symptoms and recorded an employment history of sixteen years as a rock truck driver. (DX 11). Dr. Simpao noted Claimant had a history of frequent colds, wheezing attacks (five years), arthritis, heart disease, allergies and high blood pressure. He recorded a smoking history of two packs of cigarettes a week between 1950 and 1987. Claimant's symptoms included sputum (daily), wheezing (five years), dyspnea (daily upon exertion and rest, ten years), productive cough (ten years), hemoptysis, orthopnea, ankle edema, paroxysma nocturnal dyspnea (ten to twelve times nightly with shortness of breath) and shortness of breath when walking over seventy-five feet. In addition, Dr. Simpao performed a chest x-ray, pulmonary function tests, arterial blood gas studies and physical examination on Claimant. Upon palpation Dr. Simpao found tactile fremitus and an increased right over left. At percussion he found increased resonance in the upper chest and axillary areas. Then upon auscultation he found a few crepitations. After reviewing the results of the examination and tests, Dr. Simpao diagnosed Claimant with coal workers' pneumoconiosis 1/0. Dr. Simpao based his opinion on Claimant's coal dust exposure and chest x-ray. In Dr. Simpao's opinion, Claimant has a mild impairment. (DX 11).

[6] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).
[7] Employer provided a rebuttal opinion by Dr. Vuskovich, finding the May 2, 2003 arterial blood gas study valid.
[8] Dr. Dahhan's September 10, 2003 arterial blood gas studies report fails to specify the altitude at which the studies were conducted and therefore, I will not consider it when making my findings for it does not meet the regulation requirements. *See* 20 C.F.R. § 718.105(c)(2).
[9] Dr. Rosenberg's July 17, 2004 arterial blood gas study report fails to specify the altitude at which the study was conducted and therefore, I will not consider it when making my findings for it does not meet the regulation requirements. *See* 20 C.F.R. § 718.105(c)(2).

Dr. Simpao submitted a supplemental medical report on July 12, 2005. (DX 38). Dr. Simpao stated that, although Claimant has the respiratory capacity to perform regular coal mining duties, Claimant needs to work in a dust free environment. He opined that Claimant has heart disease and arthritis which may prevent him from performing his regular coal mining duties. (DX 38). [10]

Abdulkader Dahhan, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on September 10, 2003, at which time he reviewed the Claimant's symptoms and recorded an occupational history. (DX 15). Dr. Dahhan noted Claimant worked twenty years in coal mine employment, two years of which he spent underground and the rest on the surface as a truck driver and shop worker. Dr. Repsher stated Claimant started smoking one pack of cigarettes per week at age fifteen and quit fifteen years ago. Dr. Repsher found Claimant had a history of daily cough, productive yellowish sputum production, intermittent wheezing, dyspnea on exertion, heart disease and hypertension. Upon physical examination, Dr. Repsher noted Claimant's chest showed good air entry to both lungs with no crepitations, rhonchi or wheezing. Claimant's cardiac examination showed normal heart sounds and no gallops or murmurs. His extremities showed no clubbing or edema. Dr. Repsher performed a chest x-ray, pulmonary function tests, arterial blood gas studies and an electrocardiogram. He also examined the other medical evidence in the record. He noted the chest x-ray revealed no pneumoconiosis; the pulmonary function tests and arterial blood gas studies were normal; and the electrocardiogram showed regular singus rhythm with left bundle branch block.[11] (DX 15).

Dr. Dahhan diagnosed Claimant with hypertension and coronary artery disease unrelated to coal dust exposure. In his opinion, Claimant does not suffer from pneumoconiosis or any other dust related respiratory disease. He noted Claimant suffers from no chronic obstructive pulmonary disease or respiratory impairment. Dr. Dahhan based his opinion on his physical examination of Claimant, negative chest x-ray and normal pulmonary function tests and arterial blood gas studies. (DX 15).

Dr. Dahhan provided a supplemental report on September 15, 2005. (EX 8). Dr. Dahhan reviewed Dr. Simpao's supplemental report and the other evidence in the record. Dr. Dahhan stated that he agreed with Dr. Simpao that Claimant retains the respiratory capacity to return to coal mine employment. He further stated Claimant suffers from coronary artery disease and arthritis, both of which are not the result of coal dust exposure. (EX 8).

In addition, the record includes a deposition of Dr. Dahhan taken on May 10, 2005. (EX 1). Dr. Dahhan reiterated the findings in his report and further testified that he opined Claimant does not suffer from pneumoconiosis and retains the respiratory capacity to return to his ordinary coal mine employment or similar arduous manual labor. (EX 1).

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[10] At the hearing Employer argued that the regulations do not allow the Director to supplement their medical examination after the initial examination and contended Dr. Simpao's supplemental report should be excluded from the record. I disagree with the Employer and find good cause to admit Dr. Simpao's supplemental report.

[11] As noted above, Dr. Dahhan's arterial blood gas study did not conform to regulation requirements, and therefore, will not be given weight.

David M. Rosenberg, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on June 17, 2004 and issued a medical report on Claimant's condition on June 29, 2004. (EX 2). Dr. Rosenberg reviewed Claimant's symptoms and recorded an employment history in the coal mines for twenty years. Claimant worked as a rock truck driver, performed manual lifting and operated a sweeper. Dr. Rosenberg found that Claimant smoked one or two cigarettes a day as a teenager until 1984. He recorded Claimant had a history of heart disease and complained of shortness of breath upon exertion, cough, sputum production, wheezing and trouble sleeping due to shortness of breath. Upon physical examination, Dr. Rosenberg found Claimant had decreased breath sounds but no rales, rhonchi or wheezing. Claimant had no murmurs, gallops, rubs, clubbing or edema. Dr. Rosenberg performed a chest x-ray, pulmonary function tests, arterial blood gas studies and an EKG on Claimant. (EX 2).

Dr. Rosenberg opined Claimant's total lung capacity is normal and that Claimant has no restrictions. He noted Claimant's diffusing capacity corrected for lung volumes was normal indicating the alveolar capillary bed with his lungs was intact. Dr. Rosenberg stated Claimant's chest x-ray revealed no evidence of micronodularity associated with coal dust exposure. He opined Claimant does not have pneumoconiosis. The EKG revealed a left bundle branch block. Furthermore, Dr. Rosenberg noted from a functional perspective Claimant does not have obstruction or restriction due to a normal diffusing capacity measurement. From a pulmonary perspective, Dr. Rosenberg opined Claimant could perform his previous coal mine employment based on his normal pulmonary function study and a finding of no chronic obstructive pulmonary disease. (EX 2).

Dr. Rosenberg provided a supplemental report on September 16, 2005. (EX 8). He opined Claimant does not have clinical or legal pneumoconiosis. Dr. Rosenberg relied on Claimant's chest x-ray which revealed no evidence of micronodularity related to coal dust exposure. He also opined based on a normal pulmonary function test and normal gas exchange that Claimant has no functional impairments related to coal dust exposure. (EX 8).

In addition, the record includes a deposition of Dr. Rosenberg taken on August 24, 2004. (EX 4). Dr. Rosenberg reiterated the findings in his report and further testified that he opined Claimant does not suffer from pneumoconiosis or a chronic obstructive lung disease. Dr. Rosenberg found Claimant retains the respiratory capacity to return to his ordinary coal mine employment. (EX 4).

E. Hospital and Treatment Records

The amended regulations provide that, notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3), "any record of a miner's hospitalization for respiratory or pulmonary or related disease may be received into evidence." 20 C.F.R. § 725.414 (a)(4). Furthermore, a party may submit other medical evidence reported by a physician and not specifically addressed under the regulations under Section 718.107, such as a CT scan.

The record contains treatment records from Vidya Yalamanchi, M.D. (DX 14). During Claimant's treatment with Dr. Yalamachi he never attributed Claimant's medical problems to coal mine employment. On March 17, 1999 Claimant was evaluated by Dr. Yalamanchi who

diagnosed Claimant with angia pectoris and ischemic heart disease. During the examination Claimant's chest was clear with no rales or wheezing. Dr. Yalamachi examined Claimant again on March 25, 1999. At this time Dr. Yalamachi diagnosed Claimant with angina pectoris, hypertension and coronary artery disease. Claimant had a persantine thallium and followed up with Dr. Yalamachi on April 16, 1999. Dr. Yalamachi examined Claimant and found no chest pain, orthopnea or palpitations. Claimant's chest was clear with no rales or wheezes. When Dr. Yalamachi examined Claimant on January 11, 200 he had the same prognosis as the previous examinations. Then on March 13, 2000 Claimant complained of shortness of breath, dyspnea on exertion and orthopnea; however, Claimant's chest was again clear with no rales or wheezes. Dr. Yalmachi diagnosed Claimant with congestive heart failure, but did not attribute it to coal mine employment. On June 12, 2000 and September 13, 2000 Dr. Yalmachi found decreased breath sounds but no rales or wheezing. June 11, 2001 is the last examination in the record by Dr. Yalmachi. During the exam he evaluated Claimant's angina pectoris, ischemic heart disease and hypertension. Claimant complained of swelling in his legs, dyspnea on exertion and denied paroxysmal nocturnal dyspnea and orthopnea. Claimant's chest was again clear with no rales or wheezes.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under §§ 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a). The regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs

> and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The chest x-rays in the record do not support a finding of pneumoconiosis. Dr. Simpao found the May 2, 2003 x-ray film positive for pneumoconiosis; however, the x-ray was re-read as negative by Dr. Hayes, a Board-certified radiologist and B-reader. As such, I find this x-ray negative. Dr. Dahhan, a B-reader, found the September 10, 2003 x-ray film negative and Dr. Rosenberg, a B-reader, found the June 17, 2004 x-ray film negative. Accordingly, I find the preponderance of negative x-ray readings outweigh the positive readings. Therefore, pneumoconiosis has not been established under § 781.202(a)(1).

B. Autopsy/Biopsy

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, notwithstanding a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*).

Dr. Simpao opined Claimant has pneumoconiosis based solely upon his own readings of a chest x-ray and Claimant's history of dust exposure. (DX 10). In *Cornett v. Benham Coal Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute sound medical judgment under Section 718.202(a)(4). *Id.* at 576. The Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(*citing Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Board explained that the fact that a miner worked for a certain period of time in the coal mines alone does not tend to establish that he has any respiratory disease arising out of coal mine employment. *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust

exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray... and not a reasoned medical opinion." *Id*. Acknowledging that Dr. Simpao performed other physical and objective testing, he listed that he expressly relied on the Claimant's positive x-ray and coal dust exposure for his clinical determination of pneumoconiosis. Moreover, he failed to state how results from his other objective testing might have impacted his diagnosis of pneumoconiosis. As he does not indicate any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history, I find his report with respect to a diagnosis of pneumoconiosis unreasoned.

In contrast, Dr. Dahhan's report concluded Claimant does not have pneumoconiosis. Dr. Dahhan relied on his own findings upon physical examination and review of the medical evidence. Dr. Dahhan reviewed the reports and findings of the other physicians of record in formulating his decision. He based his opinion on a more complete consideration of Claimant's current status regarding the results on the chest-x-ray, pulmonary function tests, arterial blood gas studies and clinical examination of Claimant. His opinions are consistent with the probative chest x-ray evidence of record. Dr. Dahhan further explains his findings and reasoning in his September 15, 2005 supplement report and May 10, 2005 deposition. (EX 1, 8). I find Dr. Dahhan's medical report is well-reasoned and well-documented regarding pneumoconiosis.

Dr. Rosenberg also opined Claimant does not have pneumoconiosis. (EX 2). Dr. Rosenberg opined Claimant's lung capacity is normal. To support his opinion, Dr. Rosenberg notes upon examination Claimant's total lung capacity and volumes were normal, his lungs were normal on auscultation and his chest x-ray did not reveal micronodularity. Dr. Rosenberg's opinions are consistent with the probative chest x-ray evidence of record. He further explained his findings in his September 16, 2005 supplemental report and December 12, 2003 deposition. (EX 4,8). I find Dr. Rosenberg's medical report is well-reasoned and well-documented regarding pneumoconiosis.

I have considered all the evidence under Section 718.202(a); and I find the probative negative x-ray reports and the more complete, comprehensive and better supported medical opinion reports of Drs. Rosenberg and Dahhan outweigh the unreasoned report of Dr. Simpao and the other contrary evidence of record. Thus, I find Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether Claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the evidence that his/her pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines,

> there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

Since I have found that Claimant failed to prove that he has pneumoconiosis, the issue of whether pneumoconiosis arose out of his employment in the coal mines is moot.

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i) total disability may be established with qualifying pulmonary function tests.[12] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be

[12]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

accorded to a ventilatory study where the miner exhibited a poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

In the pulmonary function tests of record, there is a small discrepancy in the height attributed to Claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). In analyzing the pulmonary function test results, I shall utilize the average height reported for Claimant, sixty-nine inches.

The pulmonary function tests of record all conform to the applicable quality standards.[13] However, the tests produced non-qualifying values. Accordingly, I find per Section 178.204 (b)(2)(i), Claimant has failed to establish total disability.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

The May 2, 2003 arterial blood gas study is the only study of record complying with regulation requirements.[14] However, it produced non-qualifying results. Accordingly, I find per Section 178.204(b)(2)(I,) Claimant has failed to establish total disability.

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must

[13] Dr. Dahhan's September 10, 2003 pulmonary function test was invalidated due to poor effort. (EX 1; DX 15).
[14] Even if the other arterial blood gas studies had conformed to regulation requirements they produced non-qualifying results.

demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment. 20 C.F.R. § 718.204 (b)(2)(iv).

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of Claimant's usual coal mine employment with a physician's assessment of Claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The physicians' reports are set forth above. In summary, Dr. Simpao performed an employment history upon Claimant finding he worked as a rock truck driver for sixteen years and opined Claimant has a mild impairment rating. (DX 11). In his supplemental report, Dr. Simpao opined that Claimant has the respiratory capacity to perform regular coal mining duties, but stated Claimant needs to work in a dust free environment. (DX 38). Although Dr. Simpao noted that Claimant's arthritis and heart disease may prevent him from performing his regular coal mining duties, Dr. Simpao never stated Claimant's respiratory condition would interfere with his ability to perform his regular coal mine employment. Dr. Simpao has objective data to support his opinion but he provides no reasoning or basis for his opinion. Therefore, Dr. Simpao's diagnosis regarding total disability is unreasoned and I give it little weight.

In contrast, Dr. Dahhan opines Claimant does not have an impairment caused by coal dust exposure. (DX 15, EX 1,8). Dr. Dahhan acknowledges Claimant suffers from hypertension, arthritis and coronary artery disease but opines from a pulmonary perspective Claimant could perform his previous coal mine employment or other similarly arduous types of labor. (DX 15, EX 1, 8). Dr. Dahhan noted Claimant did not suffer from a disability based on the normal clinical and physiological parameters of his respiratory system. He bases his opinion on his own examination, pulmonary function tests and arterial blood gas studies in the record. Dr. Dahhan also took into consideration the findings of other physicians on examination and testing. He further explained his findings and opinions in his deposition dated May 10, 2005 and supplemental opinion dated September 15, 2005. I find Dr. Dahhan's medical report is well-reasoned and well-documented regarding total disability.

Dr. Rosenberg also opines Claimant does not suffer from a respiratory impairment. He bases his opinion on his own examination and the other medical evidence in the record. Dr. Rosenberg states Claimant's total lung capacity is normal as indicated by the pulmonary function test. He took into consideration the findings of other physicians on examination testing. Dr. Rosenberg's opinion is consistent with the medical testing evidence of record. Dr. Rosenberg further explained his findings and opinions in his September 16, 2004 supplemental report and

August 24, 2004 deposition. (EX 4, 8). I find Dr. Rosenberg's medical report is well-reasoned and well-documented regarding total disability.

The record contains two well-reasoned and well-documented opinions regarding total disability. The well-reasoned and well-documented reports of Drs. Dahhan and Rosenberg outweigh the unreasoned report of Dr. Simpao. Therefore, based on the preponderance of the evidence I find Claimant has not established total disability by the probative medical opinion reports of record under the provisions of Subsection 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, Claimant has not established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has not established total disability under the provisions of Section 718.204(b).

Total disability due to Pneumoconiosis

Since I have found that Claimant failed to prove total disability, the issue of whether total disability is due to pneumoconiosis is moot.

ENTITLEMENT

In sum, the newly submitted evidence does not establish a material change in condition upon which the prior claim was denied. Claimant has not met any of the conditions of entitlement. Therefore, Mr. Adams' claim for benefits under the Act shall be denied.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for the representation services rendered to him in pursuit of the claim

ORDER

It is ordered that the claim of Leonard Adams for benefits under the Black Lung Benefits Act is hereby DENIED.

A

JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).